BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

VALERIE A. CARNAHAN	)	
Claimant	)	
V.	)	
	)	Docket Nos. 1,070,164
STATE OF KANSAS	)	& 1,072,974
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant, through Kala Spigarelli, requested review of Administrative Law Judge Bruce Moore's June 30, 2016 Award. Jeffery Brewer appeared for respondent and insurance carrier (respondent). The Board heard oral argument on October 13, 2016.

The appeal involves two separately docketed claims, one for a traumatic low back injury and the other for repetitive lumbar injuries. In Docket No. 1,070,164, the parties stipulated claimant sustained personal injury by accident that arose out of and in the course of her employment on March 28, 2014.[1] In Docket No. 1,072,974, claimant alleged injury by repetitive trauma through her last day work, which was April 5, 2014.

For the first claim, the judge found: (1) claimant failed to prove she had impairment based on the AMA *Guides*[2] (*Guides*), including that her medical expert did not specify he used the *Guides*; (2) the March 28, 2014 accident was not the prevailing factor in causing claimant's medical condition and any resulting impairment; and (3) claimant failed to prove entitlement to future medical treatment. For the second claim, the judge found claimant failed to prove personal injury by repetitive trauma and the repetitive trauma was not the prevailing factor in causing her injury. Further, the judge ruled claimant failed to give timely notice of her asserted injury by repetitive trauma.

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[1] Under K.S.A. 2013 Supp. 44-508(d), which defines an "accident," the "accident must be the prevailing factor in causing the injury." Under K.S.A. 2013 Supp. 44-508(f)(2)(B)(ii), an accident arises out of employment only if the "accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment." Despite respondent's agreement claimant sustained personal injury by accident that arose out of and in the course of her employment on March 28, 2014, respondent plainly denied claimant's accident was the prevailing factor in causing claimant any permanent injury, medical condition, and resulting permanent disability or impairment.

[2] AMA *Guides to the Evaluation of Permanent Impairment* (4th Ed.) All references are based upon the fourth edition of the *Guides*. The parties cannot cite the *Guides* without the *Guides* having been placed into evidence. See *Durham v. Cessna Aircraft Co.*, 24 Kan. App. 2d 334, 334-35, 945 P.2d 8, *rev. denied* 263 Kan. 885 (1997). The Board has ruled against exploring and discussing the *Guides*, other than using the Combined Values Chart, unless the relevant sections of the *Guides* were placed into evidence. See, *e.g.*, *Billionis v. Superior Industries*, No. 1,037,974, 2011 WL 4961951 (Kan. WCAB Sep. 15, 2011).

RECORD AND STIPULATIONS

The Board has carefully considered the record and adopted the Award's stipulations. At oral argument, the parties agreed: (1) claimant's medical expert used the *Guides* in assessing claimant's impairment of function and (2) if necessary, the Board may consult the *Guides* to help decide these cases.

ISSUES

Claimant argues her March 28, 2014 back injury resulted in a 10% functional impairment for a lumbar sprain or strain and there is no contrary evidence. Claimant asserts she is entitled to a work disability award and future medical treatment.

As for the asserted injury by repetitive trauma, claimant indicated her repetitive work played a role in the development of her back injury and when she provided notice of her injury, she did so understanding she had sustained a traumatic event on March 28, 2014. For the most part, claimant focuses her argument on receiving compensation for her injury by accident of March 28, 2014.

Respondent maintains the Award should be affirmed, arguing claimant's accident caused only a temporary aggravation of a preexisting low back condition, but no permanent impairment. Further, respondent argues claimant failed to prove a compensable injury by repetitive trauma or that she provided timely notice of the same.

The issues in Docket No. 1,070,164 are:

1. Was claimant's March 28, 2014 accident the prevailing factor causing her injury, medical condition, need for treatment and impairment?

2. What is the nature and extent of claimant's disability, if any?

3. Is claimant entitled to future medical treatment?

The issues in Docket No. 1,072,974 are:

1. Did claimant's asserted injury by repetitive trauma arise out of and in the course of her employment, including whether the alleged repetitive trauma was the prevailing factor in causing her alleged injury, medical condition, need for treatment and resulting disability or impairment?

2. Did claimant provide timely notice for an injury by repetitive trauma?

FINDINGS OF FACT

Claimant, currently 56 years old, started working for respondent in 1981. In 1984, she began working for respondent as a licensed mental health technician. At all times, her job duties included feeding, dressing, medicating and cleaning patients, including showering them and attending to their personal hygiene. Claimant testified she lifted and turned patients more than 20 times each shift and bent, squatted and twisted about 20 times each shift. She also took patients to medical appointments.

Around 2006 or 2007, claimant injured her low back, but got better after visiting a chiropractor three or four times. She testified other than occasional pain from lifting and performing other job duties at work, she experienced no additional problems and sought no further treatment for her low back until after her March 28, 2014 injury by accident.

That day, in the process of trying to use a lift to get a patient out of bed, claimant twisted and immediately felt a sharp, aching pain in her low back into her right hip. Claimant finished her shift. She thought her pain would go away in time and she self-directed treatment with a chiropractor, but her pain persisted. Claimant attempted to return to work, but was physically unable to do her job. She reported her accident to her supervisor on April 5, 2014, and was referred to Ben Cochran, a nurse practitioner. According to claimant, Cochran prescribed pain medication, ordered physical therapy, ordered a lumbar MRI and gave her sedentary work restrictions with no lifting over 10 pounds.

Claimant was referred to Joseph M. Graham, Jr., D.O., an orthopedic surgeon, who, apart from his residency and fellowship, has practiced medicine since August 2013. Dr. Graham saw claimant once on May 23, 2014. Like all doctors who testified, Dr. Graham took a history from claimant and physically examined her. According to the doctor's report, claimant reported "chronic [low back pain] that is much worse after a twisting injury at work on 3/28/14."[3] She denied radicular symptoms, including pain, weakness, numbness or tingling. Dr. Graham testified claimant's physical examination was normal other than some low back muscle spasm and tenderness with palpation.

Dr. Graham reviewed April 21, 2014 MRI films of claimant's lumbar spine, which he interpreted as showing severe degenerative scoliosis, but no acute injuries, vertebral fractures, "no new disc herniations or nothing to suggest new injury[,]"[4] no instability and no soft tissue injury. He indicated the MRI film showed significant age-appropriate degeneration and malalignment of claimant's vertebrae.

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[3] Graham Depo., Ex. B at 1.

[4] *Id*. at 12.

When asked if claimant had an acute injury on March 28, 2014, Dr. Graham testified he did not observe skin lacerations and no ecchymosis (discoloration). Dr. Graham diagnosed claimant with idiopathic[5] low back pain, lumbar degenerative disc disease, myofascial pain syndrome, degenerative spondylolisthesis at L4-5 and severe degenerative lumbar scoliosis. He indicated claimant's spasm and tenderness "could be present due to the long-term curvature of [her] spine"[6] which could have been present for months or years. Dr. Graham's report stated, "The patient's pain and pathology is not work related and is the result of degenerative changes in her spine."[7] Regarding prevailing factor, the following dialogue occurred at Dr. Graham's deposition:

> Q. . . . [C]an you state whether or not the prevailing factor and any need for medical treatment for [claimant] was related to the work incident on . . . March of 2014 or related otherwise to her lumbar spine independent of that described injury?
>
> A. No, I cannot.[8]

Dr. Graham testified claimant's accident probably caused a back sprain or strain – inflammation of tendons and ligaments connecting muscles to the spinal column. Dr. Graham testified strains and sprains usually cannot or will not be seen on an MRI. He said strains and sprains cannot be permanent because they eventually heal, with strains frequently producing symptoms for up to six weeks. Dr. Graham did not believe a sprain or strain was a physical change in the body. Instead, he indicated a physical change would be a fracture, a collapsed vertebrae, an annular tear, a herniated disc or "something . . . that would change the structural properties of . . . the disc or the vertebrae."[9]

Dr. Graham testified claimant's injury caused an exacerbation of chronic back pain. He agreed claimant's idiopathic low back pain "could" be from her injury, but could also be due to "anything" and it is "difficult to objectively prove the cause of that back pain."[10] Dr. Graham agreed claimant's myofascial pain "could" have been caused by her accident "[w]ithin a reasonable degree of medical certainty."[11]

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[5] Dr. Graham defined "idiopathic" as meaning "of uncertain etiology or cause." *Id*. at 37.

[6] *Id*. at 14.

[7] *Id*., Ex. B at 3.

[8] *Id*. at 51-52.

[9] *Id*. at 58.

[10] *Id*. at 37-38.

[11] *Id*. at 41.

Dr. Graham stated claimant could have had an annular tear that was not present on the MRI. His report did not mention an annular tear or a facet joint injury. Dr. Graham testified "[t]here was nothing objective on the MRI or physical exam that would prove without a doubt that the pain exacerbation was due to the accident."[12] He was not "certain" claimant's accident caused her injury[13] and noted there were "no changes on imaging that would indicate that they were acute and that they would result in permanent symptoms."[14]

In his report, Dr. Graham recommended temporary light duty restrictions, physical therapy, injections and another MRI. He testified he saw no evidence claimant sustained any permanent injury or impairment as a result of her accident, but acknowledged having no idea if claimant got better, worse or stayed the same after the one time he saw her. Dr. Graham gave claimant no permanent work restrictions. He testified he would never give permanent restrictions for a lumbar strain, myofascial pain syndrome or chronic low back pain, largely because he would treat a non-surgical patient for up to six weeks and refer a patient with ongoing pain to a pain management or family practice doctor for additional treatment and any need for permanent restrictions. The doctor testified he would only assume the role of providing permanent work restrictions to a patient with a surgical issue or nerve injury. After reviewing a task list generated by Paul Hardin, a vocational consultant, Dr. Graham indicated claimant had no task loss as a result of her work injury.

Claimant never returned to work for respondent or any other employer. She retired on July 1, 2014. Claimant agreed she voluntarily retired, but also testified she had no choice because respondent required a full release and never took her back as an employee.[15] Claimant testified she continues to have low back pain.

On August 8, 2014, at her attorney's request, claimant saw Edward Prostic, M.D., a board-certified orthopedic surgeon who has been licensed in Kansas since 1978. Claimant complained of low back pain due to her March 28, 2014 accident and told Dr. Prostic she had a temporary episode of low back pain about seven years earlier. The doctor reviewed the MRI report, but not the actual films, and acknowledged long-standing damage to claimant's lumbar spine due to long-standing degenerative changes, including mild stenosis at L3-5 and severe stenosis at L5-S1, but no evidence of a disc herniation. The doctor conducted x-rays showing moderate lumbar scoliosis and diffuse degenerative changes, greatest at L1-2. He acknowledged claimant did not have radiculopathy. Dr. Prostic recommended anti-inflammatory medication, intermittent heat/ice and massage, and a therapeutic exercise program. When testifying, the doctor indicated claimant may

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[12] *Id*. at 39.

[13] *Id*. at 40.

[14] *Id*. at 54.

[15] See Cont. of R.H. Trans. at 47-48.

later need physical therapy, epidural steroid injections and/or surgery. In his report, the doctor diagnosed claimant with chronic low back sprain and strain and stated her accident was the prevailing factor in causing her injury, medical condition and need for treatment.

In a February 23, 2015 supplemental report, without a second evaluation, Dr. Prostic gave claimant a 10% permanent whole body functional impairment for her injury. He did not specify he used the *Guides*, but referenced "page 99"[16] of a book to explain his rating. The doctor testified:

> . . . I thought that she did not have radiculopathy when I saw her, but should be rated as if she had a radiculopathy because of the severity of her injury, the duration of it, her range of motion deficits, her x-ray changes. So I thought that it was more appropriate to rate her as DRE lumbosacral III, rather than II, even though she did not have radiculopathy.[17]

When questioned if claimant's accident caused a physical change in the structure of claimant's body, Dr. Prostic testified, "Very likely it was a tear of a lumbar annulus, of the disc, it may have been an injury to a facet joint, but something was injured and caused acute pain and led to deconditioning."[18] Dr. Prostic testified all the changes he noted on claimant's x-ray preexisted the work injury and the accident did not aggravate or make symptomatic claimant's preexisting stenosis:

> The stenosis is a red herring. She's not having symptoms of stenosis. She's having symptoms of an acute back injury; which, if it were an only muscle, should have healed long ago. So it's more than muscle, it's probably disc or facet joint, and it has not completely healed.[19]

Dr. Prostic gave claimant restrictions to occasionally lift up to 30 pounds to her waist and 20 pounds to her shoulders and to avoid frequent bending or twisting at the waist, forceful pushing or pulling and more than minimal use of vibrating equipment. Applying these restrictions to the 31 job tasks identified by Mr. Hardin, Dr. Prostic testified claimant lost the ability to perform 17 tasks for a 55% task loss.[20]

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[16] Prostic Depo. at 17. As noted, the parties stipulated Dr. Prostic used the *Guides* to rate claimant.

[17] *Id*. at 10.

[18] *Id*. at 8-9.

[19] *Id*. at 16.

[20] When considering claimant's post-injury wage earning capability, Mr. Hardin testified claimant has a 44% wage loss, but a 58% wage loss when including her lost fringe benefits. Mr. Hardin only considered Dr. Prostic's restrictions and did not consider testimony from other doctors. Further, Mr. Hardin stated claimant's potential post-injury employers would most likely offer some type of fringe benefits valued at as much as $144 per week, but he did not include fringe benefits when assessing her wage loss.

Claimant saw Randy Hendricks, M.D., a board-certified orthopedic physician, on January 19, 2015, for a court-ordered evaluation. Dr. Hendricks has practiced orthopedic medicine and surgery for 29 years in Tulsa, Oklahoma. Claimant reported a specific work accident on March 28, 2014, and complained of mechanical low back pain without radicular symptoms. Claimant told Dr. Hendricks she twisted her back at work seven or eight years earlier, but improved after several treatments with a chiropractor.

On examination, claimant had normal gait pattern, but moved slowly. She had scoliosis of the thoracolumbar spine when bending forward, with most of the scoliosis in her lower lumbar area. Claimant's range of motion was moderately limited. Her strength was reasonably well maintained and her sensation was largely preserved. Dr. Hendricks' report did not list a diagnosis. He recommended a repeat MRI, which was performed on February 9, 2015. Dr. Hendricks saw claimant that day and his report indicated:

- claimant had degenerative discs at L1-2, L4-5 and L5-S1, including stress reactions at L1-2 and L5-S1, which are potential causes of low back pain

- claimant had spinal canal narrowing at L4-5, but no radicular symptoms and surgery was not indicated unless claimant developed radiculopathy

- "the cumulative wear and tear from 33 years of work at the Parsons State Hospital and Training Center have taken a toll on Ms. Carnahan's lumbar spine"[21] and

- claimant should use nonsteroidal anti-inflammatories, a short course of physical therapy and perform intensive home exercises.

Dr. Hendricks testified:

> Q. And were you able to render any opinions or formulate any opinions as to whether or not you felt that any work-related accident or injury under that date that she reported to you in any way caused her a physical injury?
>
> A. I didn't see anything on the patient's diagnostic studies that was an obvious, acute ruptured disc that would require treatment. Basically her MRI showed multiple levels of spondylosis, which is arthritic change. And given the fact that she's 55 years of age, that would not be uncommon.
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> . . .

[21] Hendricks Depo., Resp. Ex. 3 at 1.

> Q. Okay. Did you see any time, Doctor, following the MRI or upon your evaluation whether there had been any type of acute injury to Ms. Carnahan based upon her work-related - - or alleged work-related injury while working for the State Hospital up in Kansas?
>
> A. I didn't find anything I could conclusively implicate as the cause of her pain. Really the patient presented with a diffuse, mechanical low back pain, and she has multiple degenerative levels. She has no radiculopathy, no instability, there's nothing there that I could really operate on and get a good result. . . .[22]

Dr. Hendricks testified claimant had a lumbar strain within a reasonable degree of medical certainty, but he ordinarily would have expected claimant's lumbar strain to have improved "in a finite period of time."[23] The doctor acknowledged it was "conceivably possible"[24] claimant's mechanism of injury could cause low back pain.

Regarding the cumulative wear and tear that 33 years of work had taken on claimant's lumbar spine, Dr. Hendricks testified, "I think it's only reasonable to assume that if somebody worked somewhere for that long, there would be some degenerative changes associated from the work activities."[25] With respect to the prevailing factor requirement, Dr. Hendricks testified he never said claimant's work over the years was the major cause of her injury. He also participated in the following dialogue:

> Q. Can you state, Doctor, any opinion with regard to whether or not you feel Ms. Carnahan's condition, the prevailing factor for anything that you observed or noted, would be related to her work at the Parsons State Hospital?
>
> . . .
>
> A. Given the fact that this is diffuse, low back pain, no radiculopathy, no instability, none of these other issues I've discussed, I would have difficulty saying the prevailing factor is her work at the hospital.
>
> Q. Okay. I guess in more of legalese - - and I'm not trying to put words in your mo[u]th, and you correct me if I'm wrong - - but would it be correct to state that within a reasonable degree of medical probability - - meaning more probably true than not - - you're unable to render an opinion that her work was the prevailing factor with regard to her condition?

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[22] *Id*. at 9-11.

[23] *Id*. at 18.

[24] *Id*. at 15.

[25] *Id*. at 17.

Is that accurate?

. . .

A. Correct.[26]

On February 24, 2015, after receipt of Dr. Hendrick's report, claimant filed with the Director of Workers Compensation an application for hearing in Docket No. 1,072,974 and alleged a back injury from work-related repetitive bending, lifting and twisting through her last day worked. That same day, the judge ordered respondent to provide claimant the conservative medical treatment recommended by Dr. Hendricks. Claimant later testified that she never reported an injury by repetitive trauma to respondent.

The judge made various findings of fact and conclusions of law. In Docket No. 1,070,164, the judge ruled claimant sustained personal injury by accident arising out of and in the course of her employment, but incurred no permanent functional impairment (including not proving permanent impairment based on the *Guides*), her accident was not the prevailing factor in causing any impairment, she was not entitled to a work disability award and she did not prove entitlement to future medical treatment.

The judge stated the three testifying physicians provided opinions regarding impairment and whether claimant's accident was the prevailing factor in causing her injury, medical condition or resulting impairment or disability. The judge noted Drs. Hendricks and Graham, neither of whom used the *Guides*, indicated claimant had no impairment or permanency. He also concluded Dr. Prostic did not use the *Guides* to assess claimant's impairment. Further, the judge noted as incongruent Dr. Prostic at least partially relying on claimant's x-ray findings to justify his rating opinion when the doctor also testified claimant's degenerative changes shown on x-rays predated claimant's accident and had no bearing on the case. The judge concluded Drs. Graham and Hendricks agreed claimant's preexisting degenerative lumbar condition was the prevailing factor for her condition, not her accident, and Dr. Hendricks, the court-ordered doctor, provided the most credible opinion. Regarding Dr. Prostic's contrary prevailing factor opinion, the judge noted the discrepancy between Dr. Prostic's original written diagnosis (chronic low back sprain and strain) and the doctor's testimony (likely tear of a lumbar annulus or maybe a facet joint injury).

In Docket No. 1,072,974, the judge concluded claimant failed to prove she sustained personal injury by repetitive trauma and failed to provide timely notice of her asserted injury by repetitive trauma. Claimant appealed.

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[26] *Id*. at 10-13.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident or repetitive trauma arising out of and in the course of employment. According to K.S.A. 2013 Supp. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

(f)(1) “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

Board review of an order is de novo on the record.[27] A de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge.[28] The Board, on de novo review, makes its own factual findings.[29]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[30] The trier of fact decides which testimony is more accurate and/or credible and may adjust the medical testimony with the testimony of claimant and any other testimony relevant to the issue of disability. The trier of fact must decide the nature and extent of injury and is not bound by the medical evidence.[31]

ANALYSIS

Docket No. 1,070,164

Claimant did not prove her March 28, 2014 accident was the prevailing factor in causing her injury, medical condition, need for treatment and impairment.

Dr. Graham indicated claimant's pain and pathology were not work related, but instead were due to her degenerative spine. The doctor could not state claimant's work accident was the prevailing factor in her need for any medical treatment. While his testimony does not specifically use the term "prevailing factor," his broad statement that claimant's degenerative changes in her spine were the cause of her pain and pathology, not a work-related cause, sufficiently shows claimant's work accident was not the prevailing factor in causing claimant's injury, medical condition and her resulting disability or impairment under K.S.A. 2013 Supp. 44-508(f)(2)(B). Dr. Graham did not testify claimant's myofascial pain was due to her work accident within a reasonable degree of medical probability. His statement that claimant's myofascial pain "could" have been caused by her accident within a reasonable degree of medical "certainty" simply means her pain could be due to her injury, not that it was more probable than not probable.

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[27] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

[28] See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[29] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[30] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[31] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute.*

The Board agrees with the dissenting Board Members' concerns over Dr. Graham's opinions that lumbar sprains and strains can never result in permanent impairment and can never result in permanent work restrictions. Contrary to Dr. Graham's opinion, the Board concludes a lumbar sprain or strain is a physical change in the body. Despite problems with Dr. Graham's opinions, his prevailing factor opinion stands.

Like Dr. Graham, Dr. Hendricks indicated claimant's diffuse low back pain was due to a strain or sprain that should have resolved. Further, Dr. Hendricks did not implicate claimant's work accident as the prevailing factor in causing her injury, medical condition and any resulting disability or impairment.

Dr. Prostic's prevailing factor opinion is diluted because he provided alternate theories as to why claimant has impairment, *i.e.*, a lumbar strain or strain, as indicated in his initial report, a non-specific back injury, as noted in his addendum, or due to a possible annular tear or facet injury, as noted in his testimony. As an aside, his rating of 10% to the body as a whole, under the *Guides*, requires radiculopathy, which claimant does not have.

Given the resolution of the prevailing factor issue against claimant, the nature and extent of claimant's disability, if any, and her disputed entitlement to future medical treatment, are moot issues.

Docket No. 1,072,974

The Board agrees with the judge's determinations that: (1) claimant's asserted injury by repetitive trauma did not arise out of and in the course of her employment. The alleged repetitive trauma was not the prevailing factor in causing her alleged injury, medical condition, need for treatment and resulting disability or impairment and (2) claimant did not provide timely notice for an injury by repetitive trauma.

CONCLUSIONS

Docket No. 1,070,164

1. Claimant did not prove her March 28, 2014 accident was the prevailing factor in causing her injury, medical condition, need for treatment and impairment.

2. Given the resolution of the prior issue against claimant, the nature and extent of claimant's disability, if any, is moot.

3. Given the resolution of issue number one against claimant, her disputed entitlement to future medical treatment is moot.

Docket No. 1,072,974

1. Claimant's asserted injury by repetitive trauma did not arise out of and in the course of her employment. The alleged repetitive trauma was not the prevailing factor in causing her alleged injury, medical condition, need for treatment and resulting disability or impairment.

2. Claimant did not provide timely notice for an injury by repetitive trauma.

AWARD

WHEREFORE, the Board affirms the June 30, 2016 Award.

IT IS SO ORDERED.

Dated this _____ day of November, 2016.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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Honorable Bruce Moore

DISSENTING OPINION

The evidence establishes claimant sustained a strain or sprain of her low back on March 28, 2014. While all the medical opinions are susceptible to criticism, the undersigned Board Members would award claimant benefits based on a 5% functional impairment and leave future medical treatment open for her lumbar injury. Largely because the criticisms of Dr. Prostic's report and testimony are spelled out by the judge and the Board's majority decision, our focus is on the other medical opinions.

The Kansas Court of Appeals has rejected causation opinions that are essentially non-opinions. For instance, in *Lake*, a doctor indicated he could not "*make a statement one way or the other as to whether there is a causal relationship between the alleged work incident and the symptomatology*" absent additional documentation.[32] The Court reiterated that the doctor could not state that an incident at work was responsible for the injured worker's symptoms.[33] The Court of Appeals concluded the doctor's "uncertainty was based on a lack of documentation of Lake's testimony that he suffered immediate symptoms – not on his medical opinion that the work accident as described could not have caused the neurological injuries."[34] In fact, *Lake* states the doctor in question offered "no opinion."[35]

Dr. Graham's opinions that a lumbar sprain or strain is not a physical change in the body and sprains or strains can never result in permanent impairment are both wrong. Dr. Graham only seems to equate compensable work-related back injuries with fractures, collapsed vertebraes, annular tears or disc herniations. Kansas workers compensation law diverges from Dr. Graham's opinions. To the extent Dr. Graham wanted to point at an obvious new injury, such as a fractured vertebrae, that could be confirmed by an MRI, he goes far beyond what the law requires. The doctor acknowledged a lumbar sprain or strain would likely not or would not be seen on an imaging study.

Dr. Graham's indication claimant had an exacerbation of chronic back pain also rests on shaky ground. Claimant testified she had a transient episode of low back pain seven or eight years before March 28, 2014, but she had minimal chiropractic treatment and recovered. Admittedly, she had occasional back pain from performing her work, but there is no real evidence of a chronic low back problem predating March 28, 2014. There are no medical records showing prior treatment. Dr. Graham is the only physician indicating claimant had a preexisting condition that was exacerbated by her work accident.

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[32] *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 828, 316 P.3d 796 (2013), *rev. denied* 301 Kan. ___ (Jan. 15, 2015) (italics in original).

[33] *Id.* at 829.

[34] *Id.* at 844.

[35] *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 821, 316 P.3d 796 (2013).

While Dr. Graham's report states claimant's pain and pathology were due to her degenerative spine and not due to her work accident, he testified he did not know the cause of her low back pain and he could not state claimant's work accident was the prevailing factor in her need for medical treatment. Dr. Graham was asked if he could give such an opinion, but stated he could not. A doctor saying he or she cannot give an opinion, like in *Lake*, is different than having an opinion. Dr. Graham also, at times, seems to be operating under an alternate, yet incorrect, theory that medical proof in a workers compensation claim must be "without a doubt" or "certain."

Contrary to the judge's interpretation of the evidence, Dr. Hendricks did not state the prevailing factor in claimant's injury, medical condition and disability or impairment was her preexisting degenerative disc disease. Dr. Hendricks testified he would "have difficulty saying the prevailing factor is [claimant's] work at the hospital." Having difficulty reaching a conclusion is not the same as concluding the accident was or was not the prevailing factor. Similarly, the doctor's agreement that he was "unable to render an opinion that [claimant's] work was the prevailing factor with regard to her condition" simply means he does not have an opinion.

Like Dr. Graham, Dr. Hendricks often testified using terminology at odds with claimant's burden of proof. Instead of focusing on what is likely or probable, Dr. Hendricks testified he could not find anything to "conclusively implicate" the cause of claimant's pain. As with Dr. Graham, Dr. Hendricks focused on obvious and readily identifiable physical injuries based on imaging studies, such as finding an acute ruptured disc. If the Board were to equate compensable injuries only with maladies identifiable on an MRI, no lumbar sprains or strains would be compensable.

Kansas law requires a worker's impairment to be based on the *Guides* if the impairment is contained therein. Neither Dr. Graham nor Dr. Hendricks indicated they provided any opinions regarding permanency or impairment based on the *Guides*. Only Dr. Prostic provided a statutorily-based opinion regarding claimant's permanent impairment of function. The parties stipulated Dr. Prostic used the *Guides* to assess claimant's impairment. Based on a fair reading of the *Guides*, these Board Members would find claimant proved a 5% permanent whole body impairment based on DRE Category II, but not a 10% impairment under DRE Category III, which generally requires significant signs and symptoms of radiculopathy.

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BOARD MEMBER

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BOARD MEMBER